

10
No. 84-1044

Office - Supreme Court, U.S.

FILED

MAR 1 1985

JEFFREY L. GUTTERO
CLERK

IN THE
Supreme Court of the United States

October Term, 1984

PACIFIC GAS AND ELECTRIC COMPANY,
Appellant,

v.

PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF
CALIFORNIA

**BRIEF OF SAN DIEGO GAS & ELECTRIC COMPANY
AS AMICUS CURIAE IN SUPPORT OF
JURISDICTIONAL STATEMENT
OF APPELLANT**

JEFFREY L. GUTTERO
* RANDALL W. CHILDRESS

* Counsel of Record for
San Diego Gas & Electric Company
Post Office Box 1831
San Diego, California 92112
(619) 235-7819

March 1, 1985

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	2
I. THE COMMISSION DECISION COMPELS SPEECH IN VIOLATION OF THE FIRST AMENDMENT	2
II. NO COMPELLING STATE INTEREST IS DEMONSTRATED	3
CONCLUSION	4

TABLE OF AUTHORITIES

	Page
CASES	
Abood v. Detroit Board of Education, 431 U.S. 209 (1977)	3
Buckley v. Valeo, 424 U.S. 1 (1976)	4
Central Hudson Gas & Electric Corporation v. Public Service Commission, 447 U.S. 557 (1980)	2
Consolidated Edison Company v. Public Service Commission, 447 U.S. 530 (1980)	3
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978)	3
Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974)	3
Wooley v. Maynard, 430 U.S. 705 (1977)	3
ADMINISTRATIVE DECISIONS	
Center for Public Interest Law v. SDG&E, Decision No. 83-04-020 (Cal. P.U.C., April 6, 1983)	1
TURN v. PGandE, Decision No. 83-12-047 (Cal. P.U.C., December 20, 1983)	2

San Diego Gas & Electric Company (SDG&E), with permission of the parties hereto,¹ submits this brief *amicus curiae* in support of the jurisdictional statement filed by Pacific Gas and Electric Company (PGandE or Appellant). SDG&E believes the Court should review the important First Amendment issues raised by Appellant.

INTEREST OF AMICUS CURIAE

SDG&E is a California public utility which is presently under California Public Utilities Commission (Commission) order to insert third-party materials in its billing envelopes.² SDG&E was, to its knowledge, the first utility in the United States to be ordered by a state regulatory body to place third-party inserts in its billings. Thus, SDG&E is familiar with the constitutional principles at issue, both in theory and practice. SDG&E believes that this "experiment" has resulted in a serious violation of its First Amendment rights. SDG&E does not choose to voluntarily comply with Commission ordered access and continue to insert third-party messages when the present "experiment" expires in May 1985. Without Court review now, SDG&E anticipates it could very likely be an appellant herein if the Commission is allowed to continue to force access without adequate constitutional scrutiny.

¹Written permission from the parties to file this brief as *amicus curiae* has been obtained and filed with the Clerk of this Court.

²In *Center for Public Interest Law v. SDG&E*, Decision No. 83-04-020, slip op., (Cal. P.U.C. April 6, 1983), the Commission ordered access to SDG&E bills for a consumer group called Utility Consumer Action Network, Inc. (UCAN) to solicit funds for creation and operation. The access was termed an "experiment" and was ordered for two years, to expire May, 1985. SDG&E did not appeal.

Because of its unique interest and the critical importance of the First Amendment rights at issue, SDG&E is filing this *amicus curiae* in support of the jurisdictional statement of PGandE.

SUMMARY OF ARGUMENT

The jurisdictional statement filed by PGandE presents the important First Amendment issues for consideration. From SDG&E's perspective, the crucial First Amendment violation is that of the state compelling a protected Company to associate with and carry a message against its will. That is the clear and simple constitutional violation which SDG&E believes this Court should review and protect against.

ARGUMENT

The Commission Order¹ directing PGandE to insert third-party messages violates the utility's First Amendment constitutional guarantees.

I.

THE COMMISSION DECISION COMPELS SPEECH IN VIOLATION OF THE FIRST AMENDMENT

This Court has clearly expressed that a utility Company is entitled to First Amendment protection. *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557

¹TURN v. PGandE, Decision No. 83-12-047, slip op., (Cal. P.U.C. December 20, 1983). The Commission, similar to its UCAN decision, granted access four times a year for a period of two years.

(1980). A concomitant protection is the right *not to speak* or associate oneself with the views of others. *Wooley v. Maynard*, 430 U.S. 705 (1977); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). The state may not force a person to carry a message against his will. *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974).

In the instant case, PGandE is being forced by the state to carry the message of a third-party. As in *Wooley v. Maynard, supra*, where a state requirement forcing individuals to carry the message "Live Free or Die" on license plates was at issue, Appellant vigorously objects to carrying the third-party messages ordered by the state. This Court explained in the *Wooley* decision that the state's interest "cannot outweigh an individual's First Amendment right to avoid being the courier for such a message." (*supra*, at 717). The state's interest here in allowing fund raising solicitations cannot outweigh the utility's right not to become the courier for the Commission ordered third-party messages.

II.

NO COMPELLING STATE INTEREST IS DEMONSTRATED

In *Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980), this Court held that a compelling state interest must be demonstrated before a state may regulate what is included in a utility billing envelope. The record in this case is devoid of the state's demonstration of a compelling interest to restrict PGandE's First Amendment rights. Such an interest is required to be advanced for such state regulation to pass even cursory constitutional scrutiny. *First National Bank of Boston v.*

Bellotti, 435 U.S. 765 (1978). The state must demonstrate such a compelling interest and also must employ means narrowly drawn to avoid unnecessary abridgement of First Amendment rights. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). As PGandE fully articulates in its jurisdictional statement, the state has not demonstrated an interest which passes this constitutional muster.

CONCLUSION

This case presents a fundamental First Amendment issue of first impression. Probable jurisdiction should be noted and the Court should grant consideration of this appeal.

Respectfully submitted,

Randall W. Childress
Counsel of Record
Jeffrey L. Guttero
San Diego Gas & Electric Company
Post Office Box 1831
San Diego, California 92112
(619) 235-7819

Dated: March 1, 1985